No. 22,405

IN THE

United States Court of Appeals

For the Ninth Circuit

LLOYD E. HILDEBRAND,
Appellant,

vs.

GREAT AMERICAN INSURANCE CO.,
Appellee.

Appeal from the Judgment of the United States District Court for the Eastern District of California
Honorable Oliver J. Carter, United States District Judge

APPELLANT'S REPLY BRIEF

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SUMMARY OF ARGUMENT

Appellant does not argue that the right to implied indemnity does not exist as a principle of law nor that recovery should not be allowed where the facts support a decision that such indemnity is equitable and just. Rather, appellant argues that under the facts set forth in the agreed statement, appellee's right to indemnity is not established and that the lower court was in error in granting judgment in favor of appellee.

It is noteworthy that appellee does not discuss the facts of the cases cited by it in its reply brief;

but rather, discusses general principles that have been employed by courts in deciding implied indemnity cases. Neither does appellee discuss or point out in what manner the facts of the cases cited by it are analogous to the facts set forth in the agreed statement. Appellee gives the impression that the specific facts of the cases cited by it are not of significance. In doing so, appellee eliminates the necessity of making the fundamental inquiry, that recovery be equitable and just, and substitutes an algebraic formula.

ARGUMENT

APPELLEE ARGUES THAT ITS LIABILITY WAS IN SOME WAY PREDICATED ON APPELLANT'S NEGLIGENCE, BUT WHERE ARE THE FACTS?

A classic example of the technique employed by appellee appears at page 13 of its reply brief. Appellee states as follows:

> "Similarly, to the extent Evans was required to pay because of Appellant's failure to place the elevator in working condition and to properly service and inspect it, Evans would have a right to indemnification based on Appellant's breach of its agreement."

In order for this statement to have any relevance to this case, one must first assume that Evans' liability to the plaintiff is based or predicated on appellant's negligence and not on Evans' own negligence. However, in its amended complaint, appellee alleges negligence in the operation and control of the elevator, as well as in maintenance (Tr. 52). One thing is

for certain, and that is that appellant had nothing to do with the operation or control of the elevator. What facts are there that would support a conclusion that appellee's liability was predicated on appellant's negligence rather than Evans' negligence in the operation or control of the elevator? Since appellee cannot point to any act or omission on the part of appellant that resulted in appellee's being found liable, appellee skirts the problem by phrasing its arguments in a manner that just assumes they exist.

Another example appears at page 18 of appellee's reply brief, where appellee states as follows:

> "Reasonable men could only assume that such examinations were to be made for the purpose of ascertaining the existence or non-existence of defects or potential defects. Whether or not appellant then had to make the necessary repairs revealed by the examination is irrelevant; he clearly had an obligation to advise Evans of the necessity of such repairs."

What repairs is appellee talking about? What evidence is there that appellant discovered some defect and neglected to tell Evans about it? As is pointed out in appellant's opening brief, it is just as plausible for appellant to argue that appellee's liability was predicated on its failure to notify Evans of a latent defect which was known to exist, and that appellant's liability was predicated on a failure to discover it. One argument is just as good as the other as neither is supported by the evidence.

Appellee's entire argument based on a theory of recovery as third party beneficiary assumes that the

accident was caused solely by some act or omission on the part of appellant. This same assumption is made throughout appellee's argument concerning non-contractual implied indemnity.

Appellee cites *Otis Elevator Co. v. Maryland Casualty Co.* (1934), 95 Colo. 99, 33 Pac. 2d 974, and asserts that this case is "closely analogous to the case at bar" (Appellee's Reply Brief, p. 23). Appellee does not allege that the facts are closely analogous because upon reading the *Otis Elevator Co.* case, *supra,* it is apparent that the facts are not analogous. Among other things, the property owner in the *Otis Elevator Co.* case was in possession of the elevator and employed the elevator company to construct, repair and maintain the elevator. As a result of defective construction, the hoisting cables of the elevator pulled out from their anchors on the cage of the elevator, and the safety devices also failed to work. The elevator fell and various people were injured. The insurance company for the property owner paid various claims and then sued the elevator company for indemnification. The trial court found for the insurance company and the elevator company appealed. Among other things, the appellate court found that, "Under the contract of employment with its implied warranties, Oil Exchange Building had the right to recover from Otis for its negligence as the primary cause of the accident." (33 Pac. 2d 978).

Appellee does not discuss the facts of the *Otis Elevator Co.* case, *supra.* It asks this court to assume that the case is analogous and that the result should be the same.

At page 23 of appellee's reply brief, appellee cites Prosser, *Law of Torts* (3rd Ed. 1964), Section 48, at page 280, as follows:

> "Again, it is quite generally agreed that there may be indemnity in favor of one who was under only a secondary duty where another was primarily responsible, as where . . . an owner of land held liable for injury received upon it *sued the wrongdoer who created the hazard.*" (Emphasis added).

Then appellee states, *"This is exactly the situation in this case."* (Emphasis added).

Where is the evidence that appellant created any hazard?

Why must this court assume, as appellee insists, that appellant created a hazard and appellee was liable solely as the result of this hazard? Why must this court assume, as the lower court has done, that whatever caused the accident was the primary fault of appellant and the liability of appellee was only secondary? Why should this court assume or infer, as urged by appellee and as was done by the trial court, that the gravity of appellant's fault is serious, such as the failure to warn of a dangerous defect in the elevator which was known to appellant, rather than something far less serious such as the failure to detect a hidden defect of a type which an inspection, if made with due care, would still disclose?

Why is it reasonable to assume or infer that the gravity of fault of appellee's insureds is so slight as to be almost nonexistent liability as a matter of law

for the safe operation of the elevator? Why is this assumption or inference more correct and proper than an assumption or inference that appellee's insureds' liability was predicated on their failure to warn Evans of a known latent dangerous defect?

It is respectfully submitted that these questions cannot be answered from the evidence set forth in the Agreed Statement of Facts and which was the only evidence before the trial court.

CONCLUSION

What the appellee is really arguing, and the actual result of the decision of the lower court, is that in all cases where the lessor and owner of a building and an elevator company which is servicing the elevator under an inspection service contract are found jointly liable as the result of an accident occurring on the elevator, the lessor and property owner is entitled to indemnity from the elevator company; and that this result should be reached regardless of the absence of evidence of any causal connection between the negligence of the elevator company and the liability of the property owner and regardless of the lack of any evidence indicating a disparity of the gravity of the acts or omissions of each. Appellee argues, and the lower court has, in effect, decided, that equity and justice do not require an analysis and comparison of the seriousness of the acts or omissions of the parties or of the legal duties each violated; but rather, only requires a determination

of the general status or relationship each party had with respect to the elevator. If one party is an elevator company servicing the elevator under an inspection service contract with the tenant, and the other party is the owner and lessor of the property, then the property owner is entitled to indemnity, and whatever facts are otherwise necessary to support this result may be assumed or inferred from the general circumstances.

Wherefore, it is respectfully submitted that the judgment of the trial court should be reversed.

Dated, Sacramento, California,
July 18, 1968.

Respectfully submitted,
JOSEPH P. VAN DEN BERG,
Attorney for Appellant.

CERTIFICATE OF ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOSEPH P. VAN DEN BERG,
Attorney.